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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC.,
AND
RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF
THE STATE OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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OPINION BELOW

The opinions of the Supreme Court of the State of Washington (*Dept. of Game, et al. v. Puyallup Tribe, Inc.*,[1] 86 Wn. 2d 664, 548 P. 2d 1058 (1976)) and the trial court, the Superior Court of Pierce County, are set forth in Appendices B-E of the petitioners' Petition for a Writ of Certiorari. This court

[1]Hereinafter referred to as *Puyallup III*, 86 Wn. 2d 664.

has on two prior occasions rendered decisions in this case; *Puyallup Tribe v. Dept. of Game of Washington*,[2] 391 U.S. 392 (1968), and *Dept. of Game of Washington v. Puyallup Tribe*,[3] 414 U.S. 44 (1973). The prior decisions of the Washington Supreme Court in this same case are *Dept. of Game, et al. v. Puyallup Tribe*,[4] 70 Wn. 2d 245, 422 P. 2d 254 (1967), and *Dept. of Game v. Puyallup Tribe*,[5] 80 Wn. 2d 561, 497 P. 2d 171 (1972).

QUESTION PRESENTED

Whether a state court in allocating the harvestable catch of steelhead between tribal and nontribal fishermen pursuant to the remand directions of this court can judicially enforce that division.[6]

STATEMENT OF THE CASE

A. Nature of Proceedings

This Court in 1973 (*Puyallup II*, 414 U.S. 44) reversed a decision of the Washington State Supreme Court (*Puyallup II*, 80 Wn. 2d 561, 497 P. 2d 171) as it related to the steelhead fishery and remanded for further proceedings. This Court expressed two concerns:

> (1) "If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sport fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables — * * *" (414 U.S., *supra*, at 48.)
>
> (2) Whether hatchery fish are excluded from the treaty apportionment. A majority of the Court specifically reserved ruling on this issue, but Chief Justice Burger and Justices White and Stewart in a concurring opinion stated that the State of Washington is not obligated to subsidize the Indian fishing with planted fish paid for by sports fishermen. (*Supra*, at 49.)

[2]Hereinafter referred to as *Puyallup I*. 391 U.S. 392.
[3]Hereinafter referred to as *Puyallup II*, 414 U.S. 44.
[4]Hereinafter referred to as *Puyallup I*, 70 Wn. 2d 245.
[5]Hereinafter referred to as *Puyallup II*, 80 Wn. 2d 561.
[6]Petitioners have not challenged the state court determination that (a) the treaty entitlement under the Treaty of Medicine Creek, 10 Stat. 1132 (1854), does not include hatchery propagated steelhead, and (b) that the treaty share of the harvestable natural run of steelhead for the Indian fishermen is 45%. The petitioners here challenged the enforceability of the decree with reference to fishing activities which occur within the "Puyallup Reservation."

The State court, pursuant to the remand directions of this Court, after a full trial, concluded that hatchery fish are not included within the treaty entitlement and thus are not subject to a special apportionment between treaty and nontreaty fishermen, which nontreaty fishermen are restricted to a hook-and-line fishery.

Petitioners challenge the State court's power to enforce the decree rather than the correctness of its resolution of the issues remanded by this Court. The petitioners rely on their assertion that a Puyallup Reservation exists and their conclusion that the State court thus cannot enforce its judgment with respect to activities which occur within the boundaries of the asserted reservation. While the "reservation" question will be discussed, it must be emphasized at the outset that the Indian fishery here in question ex-

tends beyond the boundary of the "reservation." The testimony of the tribal chairperson clearly establishes that Puyallup Indians do fish beyond the boundaries of the reservation. (App. 35) Thus, this case clearly continues to involve, as it has for the last fourteen years, an off-reservation fishery. Regardless of the disposition of the petitioners' question, the State court decree should be affirmed as it affects unquestioned off-reservation fishing.

B. **Statement of Position**

The petitioners' jurisdictional contention cannot be considered without reference to and discussion of the State court's resolution of the issues presented upon remand from this Court. The State court has concluded:

(1) That hatchery fish are not included within the treaty right and therefore are not subject to a special apportionment. This conclusion has a direct relationship to the "jurisdictional" question.

(2) That the Indians are entitled to an allocation of 45% of the harvestable natural fish, which means that the remaining 55% of the harvestable natural steelhead are not subject to the treaty rights. This also has a direct relationship to the "jurisdictional" question.

The petitioners' jurisdictional contention relies upon *U.S. v. Washington*, 496 F. 2d 620 (9th Cir. 1974), cert. den. 419 U.S. 1032 (1974), in which the district court conclusion that the Puyallup Reservation had been terminated was reversed, and the case

remanded. No action has been taken on the remand, and thus no definitive resolution has been made of the questions raised in that litigation. The determination made in *Puyallup I*, 70 Wn. 2d 245, 422 P. 2d 754 (1967), that the Puyallup Reservation had been terminated, has never been reversed.[7] Further, this Court's recent decision in *De Coteau v. District County Court*, 420 U.S. 425 (1975), rendered after the Ninth Circuit decision, fully supports the conclusion that the Puyallup Reservation was in fact terminated.

The Washington Supreme Court explicitly recognized that in *Puyallup II*, *supra*,

> "we overstated our case by indicating that an Indian net fishery was a matter of right under the treaty." (Puyallup III, 86 Wn. 2d, *supra*, at 671)

which well may have misled this Court in its decision in *Puyallup II*, 414 U.S. 44. We are therefore presenting the arguments expressed in the opinion of the Washington State Supreme Court calling for reexamination of the allocation requirements of *Puyallup II*.

HISTORY OF THE PROCEEDING

In 1963 the Washington State Game Department and the Department of Fisheries commenced

[7]We recognize that in another proceeding, *Satiacum v. Washington*, 414 U.S. 1 (1973), this Court found that if Satiacum had been fishing outside the boundaries of what was or is the Puyallup Reservation, then the State court in *State v. Satiacum*, 80 Wn. 2d 492, 495 P. 2d 1035 (1972), had unnecessarily addressed and determined the federal question of whether the reservation had "ceased to exist." This Court did not state that the State court could not consider the question, but rather that it had unnecessarily done so in that proceeding.

this action, requesting a declaratory judgment seeking to determine what rights, privileges or immunities individuals who purported to be members of the Puyallup tribe possessed with reference to the exercise of the state's laws regulating fishing in the Puyallup River and adjacent waters. The pertinent provision of the Treaty of Medicine Creek (December 26, 1854), (10 Stat. 1132) is Article III, which provides:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter."

In August, 1965, the trial court concluded that neither the Puyallup Tribe, nor a Puyallup Reservation, existed and thus there were no treaty rights for individuals who were members of the Puyallup organization. The State Supreme Court decided in *Puyallup I*, 70 Wn. 2d 245 (1967), that the trial court lacked jurisdiction to consider whether the tribe existed. The Court concluded that although the Puyallup Reservation no longer existed, the Puyallup Indians have a treaty right to fish at usual and accustomed grounds. Those rights were not absolute but were subject to the state's exercise of police

power provided the state's regulations were reasonable and necessary for conservation. The court further concluded that the state had sustained its burden in establishing that the continued use of set and drift nets would result in the nearly complete destruction of fish runs in the Puyallup River. (*Supra*, at 261)

This Court took jurisdiction in *Puyallup I*, 391 U.S. 392 (1968), and concluded that the Indian treaty fishing rights are subject to the state's exercise of its police power, noting, *supra*, at 398, that the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the state in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians. This Court indicated the standard for exercising state power with respect to Indian treaty fishing rights was whether the regulations were reasonable and necessary for conservation. The proceeding was remanded to make ultimate findings on the conservation issue with the further direction that those findings should also cover the issue of equal protection implicit in the phrase "in common with." (*Puyallup I, supra*, at 403)

The remand proceeding, commonly referred to as *Puyallup II*, commenced before Pierce County Superior Court in August, 1970. In the remand proceeding, the Department of Fisheries and the Department of Game took different legal positions. The Department of Fisheries construed this Court's de-

cision in *Puyallup I*, 391 U.S. 401, to mean that the Indians had a greater right to participate in the off-reservation fishery than other citizens of the state. Consistent with that position, the Department of Fisheries established special fishing periods for Indians and imposed some restrictions on the commercial fishery by non-Indians in Puget Sound to permit a greater number of fish to reach the areas where the Puyallup Indians engage in their fishing activities. In contrast, the Department of Game construed the same language by this Court, placing weight on the reference to "equal protection implicit in the phrase 'in common with' " (*supra* at 403) and equated this with the Fourteenth Amendment to the United States Constitution. The Department of Game's position, therefore, was that the Puyallup Indian treaty fishing rights were no greater than those of non-Indians and, accordingly, did not permit any commercialization of steelhead by the Indian fishery, since steelhead under state law since 1933 have not been permitted to be sold as a commercial fish, nor caught by other than a hook-and-line fishery.

The state superior court concluded that the state had a responsibility to recognize Indian fishing rights as superior to those of the other state citizens. The regulations adopted by the Department of Fisheries were upheld as being reasonable and necessary for conservation. All parties in that proceeding sought review by the State Supreme Court.

In *Puyallup II*, 80 Wn. 2d 561 (1972), the State

Supreme Court essentially affirmed the position of the Department of Fisheries. But the court rejected the Department of Game's contention that Indians' fishing rights are not superior to those of other citizens. However, upon an examination of the record, it concluded there was justification for the complete prohibition of any net fishery for steelhead in the Puyallup River for the year 1970. The Court concluded that the Department of Game would be obligated to annually review the steelhead runs on the Puyallup River and, if there was a surplus of fish over that necessary for escapement and the hook-and-line sports fishery, then a net fishery for Indians must be permitted.

The Department of Game sought and this Court granted review of steelhead fishing on the Puyallup River. No party sought to review the state court decision involving the Department of Fisheries. It should be noted and emphasized that the Department of Fisheries' regulations did not apportion any specific percentage or quota of fish to the Indian fishery.

Justice Douglas, writing on behalf of this Court in *Puyallup II*, 414 U.S. 44 (1973), reasserted the proposition that Indian off-reservation fishing rights are subject to state regulation but that those regulations must be reasonable and necessary for conservation and not discriminatory. The court concluded there was discrimination because an Indian net fishery was barred and only a hook-and-line fishery,

entirely preempted by non-Indians, was allowed. The discrimination resulted from permitting the entire sports fishery to be considered before the Department of Game would be required to permit any Indian net fishery for surplus fish. *But there was nothing in the record to support the conclusion that the Indians were excluded from the sports fishery.* The record made in this remand proceeding clearly establishes that Indians are permitted, and do[8] participate in the hook-and-line fishery on the same basis as all other citizens with the further provision that they are not required to obtain a state license in their ceded areas. (F.F. IV, D-9)

The majority opinion specifically reserved ruling on the question of whether hatchery planted steelhead are subject to Indian treaty fishing rights at all. Three judges, in a concurring opinion, Justices White, Stewart and Chief Justice Burger, concluded that hatchery-planted steelhead are not subject to the Indian treaty fishery.

This Court did not establish a formula or quota for determining the allowable harvest by Indian fishermen of those fish subject to the treaty, stating:

> Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like. The aim is to accommodate the rights of Indians under the Treaty and the rights of other people. (*Puyallup II*, 414 U.S. at 48-49.)

[8]Testimony by Ramona Bennett, chairperson, Puyallup Tribal Council, that tribal members participate in the sport fishery. (App. 73.)

This Court's decision was announced November 19, 1973. The Department of Game promptly on November 29, 1973, adopted regulations specifically permitting a net fisheries by Indians for steelhead. (F.F. XX, D-18)

STATEMENT OF THE CASE ON THE REMAND PROCEEDING

Steelhead, an anadromous fish, are naturally spawned in fresh water streams and rivers and normally after two years in the fresh water environment migrate to salt water for a two-year period. (F.F. V, D-10) A majority of the returning steelhead, after two years in salt water, return to the fresh watershed from which they originated and spawn to propagate the next generation. Approximately 5% of those steelhead survive the spawning activity and again migrate to salt water.

The state of Washington has classified steelhead as a game fish (RCW 77.08.020) since 1933, and its citizens are not permitted to fish for steelhead by other than a hook-and-line fishery (RCW 77.16.040) nor to commercially buy or sell steelhead.[9] The state requires its citizens to acquire a fishing license ($7.50) and a $2.00 annual steelhead punchcard to engage in the fishery for steelhead. (See, RCW 77.32.010 and 77.12.031) (F.F. IV; D-9) There are exceptions provided from the payment of license fees to those who are under the age of sixteen, over the age of seventy who have been residents of the state for ten years, certain disabled veterans and treaty Indians fishing within their ceded areas. See, RCW 77.32.010, 77.12.230; *Tulee v. Washington*, 315 U.S. 681 (1942). The license fees which are charged the citizens of the state are placed in the state game fund (RCW 77.12.170) and cannot be used for any purpose other than "the protection, propagation and restoration of wildlife and game and the expenses of administration of the department." (F.F. IV; D-9)

The steelhead resource in Western Washington is relatively small in size compared with the various species of salmon. For example, in 1971 the steelhead catch represented 3.3% of the total steelhead and salmon catch, the respective numbers being 246,000 steelhead and 7,777,000 salmon. Steelhead fishing occurs in 170 to 180 rivers and streams of the state of Washington. Expert witneses testifying in this

[9]The commerical fisheries in the Columbia River for various salmon species do catch, on an incidental basis, steelhead.

remand proceeding both on behalf of the plaintiffs and defendants agreed that so long as there is only a hook-and-line fishery as contrasted with a net fishery for steelhead, there is no need for comprehensive records and data on the steelhead resource. The reason is that the inefficiency of the hook-and-line fishery is such that a reasonable escapement of steelhead will occur for spawning purposes, resulting in a reproduction of the following generations of steelhead. (F.F. VII; D-11) The introduction of a net fishery for steelhead and the management of the same will require the development of more comprehensive information and data than has been compiled in the past. Mr. Heckman, biologist for the defendants, indicated it will probably take three to five years and the expenditure of hundreds of thousands of dollars to develop sufficient data and information to predict accurately in advance run sizes of steelhead to the various watersheds, which is a necessary element in the effective management of a net fishery.

The Department of Game has been engaged for a number of years in a substantial hatchery program to enhance the production of steelhead in the state of Washington. (F.F. IX, D-12) The hatchery program utilizes eggs taken from steelhead, the eggs are hatched and the fish are reared in hatcheries and rearing ponds in various locations in the state of Washington. The state provides food for these hatchery steelhead and normally at the end of one year hatchery steelhead have reached what is referred to

as smolt size and are ready to commence migration to salt water. Such smolt are normally approximately 6 to 8 inches in length. (F.F. IX; D-12) In the natural habitat it normally takes two years for steelhead to reach smolt stage. The consistency of water temperature and availability of food shortens this period to one year in the hatchery program. The hatchery smolts are placed in the watershed at various locations at a time when they are ready to migrate to salt water, normally occurring between April 15th and May 15th on the Puyallup River. This planting program coincides with the natural outward migration of native steelhead smolt and the hatchery planted smolts spend very little time in the fresh watershed.

The Department of Game's hatchery program involves some eighteen hatcheries and nine rearing ponds, with a capital replacement value of $33,652,-241. (F.F. IX, D-12) The annual operational costs of the department for the total steelhead program, fiscal year July 1, 1972 through June 30, 1973, were $1,636,247. (F.F. IX, D-12) The sources of revenue for these expenditures consist of license fees imposed upon citizens of the state as user fees (67%), federal financing of various programs (4%), and from mitigation funds (29%). The total hatchery program of the Department of Game has an annual capacity of approximately 5,000,000 smolts, with nearly 3,000,000 of these being winter-run steelhead.

The Department of Game started planting hatchery steelhead in the Puyallup River in 1933, the year the department was created. (F.F. X, D-12) The planting of hatchery steelhead in the Puyallup River became a substantial and regularly followed program commencing in 1948 to the present time. All of the hatchery steelhead planted in the Puyallup River originate from eggs secured from the South Tacoma Hatchery located on Chambers Creek which is separate and apart from the Puyallup River. This South Tacoma Hatchery is totally financed by state funds and has a current replacement value of $2,531,795.

The direct investment in the steelhead hatchery program on the Puyallup River for the 1972-73 fiscal year was $27,991. During the year 1973, the department planted in the Puyallup River 75,000 steelhead smolts. The normal rate of return of adult steelhead from their salt water environment is approximately 10%, thus reflecting a projected return of 7,500 hatchery fish to the Puyallup River two years after their plant in 1973. (F.F. V, D-10) This reflects a direct investment by the Department of Game of $3.72 per returning adult hatchery steelhead to the Puyallup River. All of the funds used for this planting program on the Puyallup River are state funds derived from the state game fund which in turn is principally dependent upon license fees imposed on

user groups.[10] The benefits of these expenditures is reflected by the trial court finding (F.F. XI, D-14), which is strongly supported by the record, that at the present time slightly in excess of 50% of the total steelhead run in the Puyallup River consists of first generation hatchery propagated steelhead.

The recreational hook-and-line fishery for steelhead as previously noted is an inefficient fishery in the sense of comparing effort to catch. A survey taken during the 1973-74 fishing season on the Puyallup River resulted in some 3,243 persons being actually observed engaging in the hook-and-line fishery for steelhead. At that time those individual fishermen were interviewed, and the interviews reflected that the fishermen at the time of the interview had fished some 9,059 hours (F.F. XIX, D-19). To reflect additional fishing time after the interviews and also to reflect fishermen who were not observed and not "interviewed" a formula explained in the record produced an estimate that for the 1973-74 steelhead season on the Puyallup River, consisting of 121 days, sports fishermen spent 92,514 man hours to catch an estimated 4,354 steelhead.

There are approximately 850 members of the Puyallup Tribe, of which 320 are over the age of 21. Twenty Puyallup tribal fishermen fish essentially full-time with another twenty being basically part-

[10]The only exception to this statement in the last 20 years was a $3,000 grant of federal anadromous fish funds from the U.S. Fish and Wildlife Service to fund a portion of a study conducted by Mr. John Hisata of the Department of Game in 1972-73 re a creel census on the Puyallup River.

time fishermen and, lastly, an additional twenty who only occasionally participate in the fishery. The majority of the Indian fishery is for salmon (F.F. XV, D-16), with the catch of salmon exceeding steelhead on a ratio of approximately 10 to 1. Steelhead which are caught in the Puyallup River average six to eight pounds with a commercial value of approximately $10. While it is difficult to ascertain the Indian catch on the Puyallup River during the 1973-74 seasons, it appears to have been in the neighborhood of 2,500 to 3,000 steelhead.[11]

As previously indicated, the Department of Game promptly following this Court's decision in *Puyallup II*, 414 U.S. 44, adopted regulations specifically permitting a net fishery by Indians for steelhead in the Puyallup River. The special season under that regulation terminated on January 17, 1974, but the Puyallup Tribe continued to fish following the termination of the regulation. They testified that they did not feel nor consider themselves bound by state regulations. That position by the tribe has continued notwithstanding the decision by the state court on the remand of this proceeding. On February 27, 1976, the Pierce County Superior Court found that the tribe and the tribal officers were in contempt for failure to comply with court orders prohibiting

[11]The fish coordinator for the Puyallup Tribe testified to a range of 2,000 to 2,500. The biologist testifying on behalf of the tribe indicated an Indian reported catch of 1,800 steelhead as of January 7, 1974, and the chairwoman of the tribe reported a tribal catch of approximately 700 after January 7, 1974. The biologist testifying on behalf of the Department of Game indicated a catch of approximately 3,000 steelhead.

them from encouraging or participating in a fishery for steelhead after tribal members had caught the apportionment of the steelhead run decreed by the superior court. The court did not impose any sanctions as a result of its judgment for contempt.

The record in this case shows that the tribe has no enforcement officers and depends upon its own fishermen for determining what modifications will be made in Indian fishing regulations. The record further establishes that although the tribe depends in substantial part upon professional advice received from the United States Fish and Wildlife personnel, they have rejected suggestions made by such personnel for reduction in tribal fishing efforts. (App 91-92.)

SUMMARY OF ARGUMENT

The Washington State courts have acted in accordance with the directions of this Court on the remand of *Puyallup II*, 414 U.S. 44. In doing so, the court has provided for an allocation of the harvestable natural run of steelhead in the Puyallup River between the treaty fishermen and nontreaty fishermen and further, has properly determined that hatchery fish which are raised by the State with the expenditure of State funds has resulted in a resource which was not contemplated for inclusion within the provisions of the Treaty of Medicine Creek, *supra*.

The petitioners have continued since the outset of this litigation some fourteen years ago to contend that the State courts do not have jurisdiction to con-

sider this matter. This Court has previously, *Puyallup I*, 391 U.S. 392, rejected the jurisdictional contention by remanding for further proceedings in *Puyallup II*, 414 U.S. 44, and this Court obviously again rejected those contentions. The State is seeking to determine the extent to which it can apply its regulatory powers with relation to fishing activities by individual members of the Puyallup Tribe. When the scope of that power has been defined, the State can then seek remedies against individual Indian fishermen who violate those regulations.

The petitioners have placed considerable weight on the allegation that the Puyallup Reservation continues to exist. It must be emphasized that even if the reservation exists, the record indicates that the Puyallup Indians have and continue to fish for steelhead in the Puyallup River beyond the boundaries of what is alleged to be the Puyallup Reservation. With reference to the reservation question, in *Puyallup I*, 70 Wn. 2d 245, it was declared that the Puyallup Reservation had been terminated and that ruling has never been reversed in these proceedings. Further, the Congressional Record when actions relating to the Puyallup Reservation are considered in light of this Court's recent decision in *De Cotcau v. District County Court*, 420 U.S. 425 (1975), leads to the same conclusion as that expressed in *Puyallup I, supra*; i.e., the Puyallup Indian Reservation was terminated by Congressional action.

The petitioners are challenging the enforceabil-

ity rather than the correctness of the decision made by the State court regarding the allocation between treaty and nontreaty fishermen in the Puyallup River. The basis for requiring such allocation is this Court's decision in *Puyallup II*, 414 U.S. 44. We have respectfuly requested that this Court reexamine that decision. The Washington State Supreme Court in *Puyallup III*, 86 Wn. 2d 664, has acknowledged that it overstated its position in *Puyallup II*, 80 Wn. 2d 561, and thereby may have misled this Court in its decision in *Puyallup II*, 414 U.S. 44. The State court has concluded that but for *Puyallup II*, 414 U.S. 44, it would conclude that the "in common" fishing provision of the Treaty of Medicine Creek, *supra*, protects access to the resource in the form of an easement and precludes the imposition of license fees. However, in all other respects that provision is the equivalent of the Equal Protection Clause of the Fourteenth Amendment.

III.
ARGUMENT

A. Introduction

The Puyallup tribal members predicate their claim for special fishing rights for steelhead on Article III of the Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, 1133, which provides as follows:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses

> for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

This Court in *U.S. v. Winans*, 198 U.S. 371, 381, 384 (1905), while construing a substantially similar treaty provision with the Yakima Indian Nation concluded that the nature of the fishing right was in the form of an easement and stated, *supra*, at 384:

> it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possess as "taking fish at all usual and accustomed places." Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.

Subsequently in 1942 in *Tulee v. Washington*, 315 U.S. 681, this court again construed the fishing rights provision in the Yakima Indian treaty. The court, *supra* at 684, stated:

> * * * that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here [the fee was a license fee, the proceeds of which were deposited in the state general fund].

In *Puyallup II*, 414 U.S. 44 (1973) it was clearly stated that:

(1) The state can regulate in the interest of conservation provided the regulations meet appropriate standards for fishing activities of treaty Indians.

Supra at 45:

> * * * "'right of taking fish, at all usual and accustomed grounds and stations [which] is * * * secured to said Indians, in common with all citizens of the Territory'" extends to off-reservation fishing but that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." * * *

(2) The Court found that there was discrimination because an Indian net fishery was barred and only a hook-and-line fishery entirely preempted by non-Indians was allowed. There was nothing in that record to support the conclusion that Indians were excluded from the sports fishery and the record in this remand makes clear that Indians do in fact participate in a sports fishery on the Puyallup River.

(3) Net fishing by the Puyallup Indians for commercial purposes is covered by the treaty and the state cannot totally prohibit net fishing even when the number fish necessary for spawning and escapement plus those caught by the sports fishery

substantially equal the entire fish run. Rather, the state must consider the net fishery in conjunction with the hook-and-line sports fishery for steelhead on the watershed. The court stated, *supra*, at 48:

> Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

(4) This court emphasized that the fishing activities by both treaty Indians and non-Indians are subject to the conservation needs for the species. The court specifically stated, *supra* at 49:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. * * *

(5) The majority of the court specifically reserved ruling on the question as to whether the Indian treaty fishing rights extended to the steelhead which are developed and planted in the watersheds pursuant to the state's hatchery program. Justice White with Chief Justice Burger and Justice Stewart joining in a concurring opinion specifically stated, *supra* at 49:

> * * * On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. The opinion below, as I understand it, indicates that the river, left to its own devices, would have an annual run of 5,000 or 6,000 steelhead. It is only to this run that Indian Treaty rights extend. Moreover, if there were no sports fishing and no state-planted steelhead, and if the State, as the Court said it could when this case was here before, may restrict commercial fishing in the interest of conservation, the Indian fishery cannot take so many fish that the natural run would suffer progressive depletion. Because the Court's opinion appears to leave room for this approach and for substantial, but fair, limits on the Indian commercial fishery, I am content to concur.

While courts have indicated that treaties and statutes ratifying agreements with Indians should be construed liberally in their favor (see, *Antoine v. State of Washington*, 420 U.S. 194 (1975)), they cannot under the guise of interpretation, be rewritten to make them mean something they were not intended to mean. *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947). These

sentiments were also expressed in *Choctaw Nation v. United States*, 318 U.S. 423, 432-433 (1943):

> But even Indian treaties cannot be rewritten or extended beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.

Quoted with approval in *Skykomish Indian Tribe v. France*, 320 F. 2d 205, 207 (9th Cir. 1963).

B. Proper to Exclude Hatchery Fish From the Special Indian Treaty Fishery

When the treaty was negotiated in 1854, there was no hatchery system either in existence or contemplated. It is clear that the parties to the treaty did not envision that either the state, the federal government or any other person would stock the river with hatchery-propagated steelhead. The record shows that the planting of hatchery fish in the Puyallup River commenced in 1933 but did not become a substantial program until 1950 (App. 31-32).

When the treaty was signed, some citizens were engaged in the cultivation and harvesting of shellfish. Although shellfish were native to the area, the investment of time, money and effort in this cultivation and harvesting was specifically recognized by the following provision in the treaty:

> *Provided, however* that they [Indians] shall not take shellfish from any beds staked or cultivated by citizens, * * * (Treaty of Medicine Creek, 10 Stat. 1132, 1133)

This plain language demonstrates that the rights

secured the tribe under the treaty did not include artificially propagated sources of shellfish. It is logical and consistent with that provision to interpret the intention of the parties, had they been aware of the subsequently developed capability to artificially raise and plant steelhead in the watersheds of Western Washington, to have excluded hatchery steelhead from the treaty. Such recognition gives the same effect to the investment of time, energy and money in the hatchery steelhead program as is given the raising of shellfish.

The record in this proceeding is clear and uncontroverted that the state has a substantial investment in the hatchery planting program for steelhead in the Puyallup watershed. It is further clear that the hatchery fish enhance and augment the steelhead run in the watershed and that all fishermen, including Indians, benefit from the hatchery-planted steelhead. (App. 58, 90) We have not found any case precisely ruling upon the question of the status of hatchery fish vis-a-vis treaty fishing rights by Indians, but three Justices of this Court have already in this proceeding concluded that the Indian treaty fishing rights do not reach nor include sharing in the hatchery-planted steelhead. (See quotation from concurring opinion in *Puyallup II*, 414 U.S. 44 at 49, 50, p. 24 of this brief.

The record clearly establishes that the total expenditure for the propagation of the hatchery steelhead on the Puyallup River has been borne by De-

partment of Game funds with the single exception of a $3,000 survey conducted on the Puyallup River in the 1972-73 season. (App. 31) The costs entailed in the steelhead planting program on the Puyallup have reflected an investment of $3.72 for every returning adult hatchery steelhead to the Puyallup watershed. (App. 32) The costs of financing this program are essentially borne by the sportsmen of the state paying license fees and other incidental revenue derived by the Department of Game. (Ex. 74-3, 74-4, 74-5; App. 30-31) This steelhead planting program by the Department of Game in the Puyallup River commenced when the department was created in 1933 and subsequently was substantially increased in 1950 continuing to the present time. (App. 31-32)

The respondent's position is that the Indians' treaty fishing right does not extend to the hatchery supplied fish, irrespective of the source of financing for the planting of those fish. We hasten to add that in the instant case the record clearly shows that insofar as the Puyallup River is concerned, the entire planting program has been from state funds, which are derived from the state game fund, not general.

By analogy, this Court's decision in *Ide v. United States*, 263 U.S. 497 (1924), supports the conclusion that hatchery fish are not included within the provisions of the treaty. The United States instituted suit to enjoin threatened interference with

changes it was making in a natural ravine while completing and perfecting an irrigation system. The ravine had a natural waterflow for approximately 60 days a year, commencing in February. At all other times the ravine was naturally dry. The defendant, a landowner adjoining the ravine, claimed a right by appropriation to the waterflow in the ravine. The United States by the creation of an irrigation system had increased the waterflow in the ravine, which was referred to as an "artificial flow." *Supra*, at 504. The crucial question was whether Ide had any rights to this artificially created extra flow of water in the ravine. This Court held that he did not.

The situation is substantially parallel to that in the instant proceedings; *i.e.*, the federal government expended time, energy and money to create a new artificial flow of water which had not previously existed. Similarly, the Department of Game has through the expenditure of time, energy and money created a run of hatchery propagated steelhead. Further, the United States was able to establish and identify the additional artificial flow of water as contrasted with the previous natural flow that only occurred during 60 days of the year. In the instant case the state department has clearly established its ability to identify the first generation hatchery propagated steelhead from those naturally spawned within the river.

With these factors in mind, the following quotation in *Ide, supra* at 506 from *United States v. Haga*, 276 Fed. 41, 42 (U.S.D.C. Idaho 1921) is particularly apropos:

> "One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used."

The *Ide* decision has not been overruled and has been relied upon in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The court in considering that complex water litigation referred to the segregation of artificial (storage) water and the natural flow of water. *Supra* at 596, 605, 606, 630, 636, 640. In all of these references the court recognized the necessity of segregating the artificial from the natural flow of water and again quoted with approval the

foregoing language from *Ide v. U.S.. Supra* at 636.

We respectfully submit that the court's exclusion of hatchery reared steelhead from the Indian treaty fishing right is consistent with a reasonable reading of the treaty, with *Ide, supra,* and with any reasonable concept of any equity and justice.

C. "Puyallup Reservation"

1. Introduction

Following the enactment of the Cushman Act of 1904 (33 Stat. 565), the former Puyallup Reservation was considered to have been terminated. See, *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603 (1905). Consistent with that conclusion, the court in *Puyallup I* (70 Wn. 2d 245 at 253) concluded that the Puyallup Reservation had been terminated and no longer existed. Subsequently in 1971 the Acting Assistant Solicitor of the Department of Interior issued a memorandum expressing the opinion that the Puyallup Reservation had not been terminated and still exists. Following that opinion the United States Attorney on behalf of the United States government, filed an action in the United States District Court for Western Washington, No. 39-71C3, seeking a declaration that the Puyallup Reservation exists and that the tribal members have exclusive rights to regulate all fishing on or in the Puyallup River within the Puyallup Reservation. The United States District Court rejected those contentions and concluded that the Puyallup Indian Reservation had been terminated. Subsequently the Ninth Circuit in

U.S. v. Washington, 496 F. 2d 620 (1974) cert. den. 419 U.S. 1032 (1974), concluded in a per curiam opinion that the Puyallup Indian Reservation exists and remanded the cause to the trial court for proceedings in conformity therewith. No further actions have been taken in that proceeding.

Even if one accepts the premise asserted by the petitioners; i.e., that the Puyallup Reservation exists and encompasses the Puyallup River, it is clear from the record in this proceeding that the fishing activities of the members of the Puyallup Tribe are not confined to the reservation area. Thus, even if the reservation exists and if that existence precludes the exercise of state jurisdiction within it, there remains the off-reservation fishing activities by Puyallup Indians, which are clearly subject to the state's jurisdiction.

2. The Puyallup Reservation No Longer Exists

The issue presented by petitioner on certiorari raises the fundamental question of whether there is in fact a Puyallup Reservation. We recognize that the Ninth Circuit decision in *United States v. Washington, supra* has concluded in a per curiam opinion on the basis of *Mattz v. Arnett*, 412 U.S. 481 (1973) that the Puyallup Reservation exists. There are, however, significant differences between the Klamath Reservation (*Mattz*) and the "Puyallup Reservation" which have been highlighted by this court's more recent decision in *De Coteau v. District County*

Court, 420 U.S. 425 (1975) wherein the Tenth Circuit Court of Appeals' finding that the Lake Traverse Reservation continued to exist was reversed by this court. We recognize that the termination of a reservation does not terminate hunting and fishing rights associated with the reservation area. See *Menominee Tribe v. United States*, 391 U.S. 404 (1968), *Kimball v. Callahan*, 493 F.2d 564 (Ninth Cir. 1974) cert. den. 419 U.S. 1019 (1974). But the termination of the reservation does mean that the area is subject to state jurisdiction so as to permit that jurisdiction to be exercised regarding treaty hunting and fishing rights.

The area which had been the Puyallup Reservation has been subject to state jurisdiction since the effective dates of the Congressional consent to the alienation of land and its removal from its prior status as an Indian reservation. See *United States v. Kopp*, 110 F. 160 (U.S.D.C. Western Washington (1901)) and *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603 (1905). The area in question had clearly lost its characteristics as "Indian country" or reservation and now comprises an integral part of the City of Tacoma, the third largest city in the State of Washington and the surrounding urban and industrial areas.

We have included in the appendix to this brief a map showing the boundaries of the 18,000 acre Puyallup Indian Reservation. This map clearly indicates that within those boundaries are located a

major part of the Port of Tacoma industrial development district, various small towns, part of the third largest city in the State of Washington (Tacoma), and the major north-south Interstate Highway No. 5. We have examined the 1970 census tracts for this area in Pierce County, Washington, and nine census tracts are completely within those boundaries (Nos. 601, 602, 621, 622, 633, 705, 708, 709, and 710), which reflect a total population of 22,848 with an Indian population of 579. When the proportional part of the three census tracts which lie partially within the boundaries and partially without (Nos. 620, 623 and 707) are divided to represent on the same proportion population as the portion of the tract which lies within the boundaries, it reflects a total population in this area of 26,666 with an Indian population of 636.

Thus, the area obviously has none of the usual attributes of an Indian reservation and, in fact, is indistinguishable from any other urban-industrial area.

In this portion of the brief we will examine the creation and termination of the Puyallup Reservation and compare it with the Klamath (*Mattz*) and Lake Traverse (*De Coteau*). First we should consider the formation of the Puyallup Reservation and its subsequent termination pursuant to Congressional authorization.

The Treaty of Medicine Creek was executed on December 26, 1854, between the United States and

representatives of the various Indian tribes in Western Washington including the Puyallup Indians. The treaty is reported in 10 Stat. 1132, the pertinent provisions thereof being Articles II and VI, which are set forth in the Brief's Appendix, page 70. Under the provisions of the treaty, the reservation which was established for the Puyallup Indians was changed by Presidential Executive Orders dated January 20, 1857 and September 6, 1873. Those Executive Orders are cited in *Indian Affairs, Laws and Treaties*, Kappler (1904) pages 1919, 1922 and 1923.

In 1884, the United States Congress permitted the allotment of lands which were included within the Puyallup Indian Reservation. 23 Stat. 76, 88-89.

The State of Washington, after being admitted to the Union in 1889, in 1890 passed an act removing all restrictions on the alienation of lands allotted to the Puyallup Indians, *subject to Congressional approval* (RCW 64.20.010, quoted in Brief's Appendix, page 71.) Pursuant to a Congressional enactment, 26 Stat. 336, 354, a three-man commission was appointed in 1890 to study the nature of land title within the Puyallup Reservation and to make recommendations to the Secretary of Interior concerning the future disposition of that land. In light of the inconclusive nature of a Puyallup commission report dated March 11, 1891, Congress on March 3, 1893, enacted the Puyallup Allotment Act, 27 Stat. 612 at 633 (quoted in Brief's Appendix, pages 71-74).

The act provided for a three-member commission appointed by the President to select and appraise property within the Puyallup Reservation and further provided for the sale of lands within the reservation with the approval of the Secretary of the Interior, and specifically provided:

> * * * which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money; * * * *Provided*, That the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the City of Tacoma, * * * *And provided further*, That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act * * *

As of January 19, 1904, all of the lands, except approximately 36 acres of the 18,000, had been allotted under the 1893 act. In response to questions as to the legal effect of the ten-year prohibition on alienation under the 1893 act for Indian allottees, Congress enacted the Cushman Act, 33 Stat. 565, in 1904, making express Congressional consent to the removal of all restrictions on alienation, providing:

> That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation 'for a period of ten years from the date of the passage' thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to

> their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

The Cushman Act reaffirmed the Congressional consent to the alienation of lands on the Puyallup Reservation and was a clear confirmation of the state's acceptance of jurisdiction provided in the state 1890 enactment (quoted in the Brief's Appendix, pages 71-74).

In 1893 Congress considered the removal of the restrictions on alienation and enacted 27 Stat. 612 at 633. The discussions in the Congressional Record on this provision indicate the only "problem" relative to the legislation was that some individuals had previously acquired secret leases from the Puyallup Indians. Under the terms of those leases, the lessee would receive a conveyance of the property when the restrictions on the alienation were removed. See, Volume 24, Congressional Record, 42nd Congress, pp. 2379-80, March 2, 1893, United States Senate. Other comments relating to the Puyallup in the Congressional Record, *supra*, at pages 2068, 2070, 2136, 2137, 2389 and 2390, cannot be construed as indicating any Congressional rejection of an abolition of the reservation.

Subsequently in 1904, when Congress enacted the Cushman Act, 33 Stat. 565, the Congressional Record of the 58th Congress, Volume 38, at pp. 2605-2607, contains extensive material relating to the Act, including the following.

Senator Cushman explained that the general purpose of the legislation was to clarify the 1893 act to make it clear that the alienation permitted under that act was effective and to make express Congressional consent to the removal of all restrictions on alienation. The language of the 1893 act which prohibited alienation by Indians for a period of ten years had created problems in obtaining title insurance for transfers after the ten-year period.

Two letters from W. A. Jones, Commissioner of Indian Affairs, which were inserted in the Congressional Record make clear that there was no Congressional intention to continue a Puyallup Reservation. The first letter was to the Honorable A. G. Foster of the United States Senate dated November 18, 1903, which stated in part:

> * * * Neither this office nor the department is now exercising any control whatever over the sale of Puyallup allotted lands. The Indians are left to dispose of the same, if they so desire as they see fit. * * * (38 Congressional Record 2608)

The second was addressed to the Secretary of Interior dated December 19, 1903, which stated in part:

> Under the provisions of the treaties referred to, the restrictions upon the sale and conveyance of these lands, and upon their taxation, etc., were to continue in force until a state constitution embracing such lands within its boundaries should be formed and the legislature thereof should remove the restrictions with the consent of Congress. As indicated above, the

state first removed the restrictions in the year 1890, and in 1893 Congress passed what is known as the Puyallup Act, containing the provision above noted, intending, as it would seem, to remove the restrictions fully and completely upon the sale of Puyallup allotted lands by the Indians and true owners thereof.

This office does not see any objection to the passage of the bill under consideration. It is not seen that it can do the Indians and true owners of these unsold allotments any harm or injury. Should it become law, it would certainly be clear to all concerned that the government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned.

We do not find any Congressional references to the Puyallup *Reservation* following the 1904 act, *supra*. Acts in which we find reference to Puyallup but not "Puyallup Reservation" are as follows:

34 Stat. 1015 at 1050 (1907). Reference is made to the Puyallup agencies and further the Secretary of Interior was authorized with the Puyallup Indian consent to sell lands reserved for cemetery and school purposes. It is notable that the same statute when it refers to the Colville on the same page, refers to the "Colville Reservation." But, no reference is made to the Puyallup Reservation.

45 Stat. 378 (1928). An appropriation of funds for the upkeep, maintenance and care of the "Puyallup Indian Cemetery." Again, no reference to a Puyallup Reservation.

46 Stat. 1526 (1931). Provided for the distribution of tribal funds to the Puyallups, but again, no references were made to a Puyallup Reservation.

50 Stat. 564 at 587 (1937). An appropriation for the care and upkeep of the Puyallup Indian Cemetery. Again, no reference to a Puyallup Reservation.

52 Stat. 291 at 314 (1938). An appropriation for the care and upkeep of the Puyallup Indian Cemetery. Again, no reference to a Puyallup Reservation.

53 Stat. 1405 (1939). Authorization for the Secretary of Interior to acquire 38 and 51/100th acres from the Puyallup Indians for an Indian Sanitarium. Again, no reference to a Puyallup Reservation.

56 Stat. 1040 (1942). This act related to a change in the Puyallup tribal roll and an appropriation to complete the acquisition of title to the Puyallup Indian tribal school properties. Again, no reference to a Puyallup Reservation.

The foregoing clearly indicates that Congress has not since the 1904 Cushman Act made reference to nor recognized the continuing existence of the Puyallup Reservation.

We should now turn to a comparison of the Klamath Reservation (*Mattz, supra*) Lake Traverse (*De Coteau, supra*) and the Puyallup with reference to the elements which have been considered by this Court to be of importance in determining whether an Indian reservation has been terminated.

a. Congressional history, not only of the specific act but also previous congressional proposals to abolish a reservation.

(i) *Klamath Reservation:*

This Court observed in *Mattz, supra,* at 500, 502, that eight Congressional bills were introduced during the period of 1879-1892 and

> Each bill would have "abolished" the reservation and would have made the land subject to homestead and preemption of entry, (*supra,* 501)

This Court after having extensively considered the legislative history of unsuccessful attempts to specifically "abolish" the Klamath River Reservation, stated, *supra,* at 502:

> It is against this background of repeated legislative efforts to terminate the reservation, and to avoid allotting reservation lands to the Indians, that the 1892 Act was introduced.

Furthermore, the Court observed that the legislative history of the enactment of the 1892 Klamath Act shows that the United States Senate specifically deleted the reference in the original House Bill to "the removal of the Indians from the land" and substituted a provision that land should be allotted to the Indians under the General Allotment Act of 1887 (*Mattz, supra,* at 503).

(ii) *Puyallup Reservation:*

There is no indication of prior unsuccessful congressional efforts to abolish the Puyallup reservation prior to or during the period the Congress enacted 26 Stat. 336 (1890), 27 Stat. 612 (1893) and 33 Stat. 565 (1904).

(iii) *Lake Traverse Reservation:*

No references are made by this court in *De Coteau* to unsuccessful efforts in Congress to abolish the reservation.

b. Subsequent congressional acts continuing to recognize the existence of the Indian reservation.

(i) *Klamath Reservation:*

This Court noted two specific references to the Klamath River Reservation in the *Mattz* decision, *supra* at 505. Those specific statutes are:

> 56 Stat. 1081 (1942), Congress made specific reference to the "Klamath River Reservation." Subsequently in 1958, in 72 Stat. 121, Congress in listing Indian reservations included "Klamath River, California."

(ii) *Puyallup Reservation:*

There are no subsequent references to the Puyallup Reservation in federal statutes. See those statutes previously referred to in this brief, pp. 38. In *De Coteau, supra,* at 442 this Court noted that the continued activities of federal Indian agents and regular appropriations by Congress to the tribes for their welfare did not constitute a recognition of continued reservation existence.

(iii) *Lake Traverse Reservation:* This Court did not observe any subsequent congressional references to a Lake Traverse Reservation, after the act which this Court construed to constitute a termination of that reservation.

c. Continued recognition by federal agencies.

(i) *Klamath Reservation:*

This court specifically noted in *Mattz, supra*, at
505

> Finally, our conclusion that the 1892 Act did not terminate the Klamath River Reservation is reinforced by repeated recognition of the reservation status of the land after 1892 by the Department of the Interior and by Congress. In 1904 the Department, in Crichton v Shelton, 33 ID 205, ruled that the 1892 Act reconfirmed the continued existence of the reservation. In 1932 the Department continued to recognize the Klamath River Reservation, albeit as part of the Hoopa Valley Reservation and it continues to do so today.

(ii) *Puyallup Reservation:*

The Puyallup Reservation has been subject to the state's jurisdiction since the effective dates of the Congressional consent to the alienation of the land and the removal of its status as an Indian reservation. See *U.S. v. Kopp, supra* (1901), and *State v. Smokalem, supra* (1905). The contention that the reservation was not terminated was not raised until a 1971 opinion of an acting assistant solicitor of the Department of Interior who issued an opinion similar to the 1972 solicitor's opinion giving rise to the Lake Traverse litigation.

(iii) *Lake Traverse Reservation:*

This court observed that the state jurisdiction had gone virtually unquestioned until the 1960's. The case was precipitated by a 1972 opinion by the Solicitor of the Department of Interior concluding that the reservation had not been terminated.

d. The nature of the interest which was conveyed by the sale of lands within the reservation.

(i) *Klamath Reservation:*

The 1892 Klamath Act, 27 Stat. 52, provided that the sale of patents were subject to a trust provided "heirs of any deceased settler shall succeed the rights of such settlers under the act".

(ii) *Puyallup Reservation:*

The 1893 Puyallup Act, 27 Stat. 612 at 633, provided that the deeds which were to be issued for the sale of the property were "to operate as complete conveyance."

(iii) *Lake Traverse Reservation:*

This provided for complete conveyance.

e. What portion of the lands within the reservation were to be conveyed.

(i) *Klamath Reservation:*

The 1892 Act reserved from settlement or entry "any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupancy of said village or settlements of Indians."

(ii) *Puyallup Reservation:*

The only land not available for sale by the commission under the 1893 Act, *supra*, was the "homes of the Indian allottees; and also that part of the agency tract, exclusive of the burying grounds; not needed for school purposes. * * *" This resulted in only one-half of one percent of the 18,000 acres

being retained in trust status for the Puyallup Indians.

(iii) *Lake Traverse Reservation:*

All of the land within the reservation with the exception of that allotted to individual Indians in 160 acre allotments was subject to disposition by the United States. This Court observed in *De Coteau*, *supra*, at 428 that this resulted in about 15% of the land being retained in the form of Indian trust allotments.

f. Limitations upon the ability of the purchaser to reconvey the lands.

(i) *Klamath Reservation:*

This Court in *Mattz* construed the 25-year trust period provided for in 24 Stat. 390 as applying to the lands transferred under the act. Further, Congress specifically extended that trust period in 1919 by 56 Stat. 1081.

(ii) *Puyallup Reservation:*

The 1893 Act, *supra*, permitted the Commission to alienate lands without any trust period. The only lands which were subject to the trust were those which were included in the following proviso "That the Indian allottees shall not have the power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act. * * *" The 1904 Act, *supra*, clearly and explicitly removed the alienation restriction on the allotments referred to in the proviso.

(iii) *Lake Traverse Reservation:*

No trust period or limitation on the ability to alienate the lands obtained was imposed.

We respectfully submit that the foregoing considerations relating to the former Puyallup Reservation and its comparison with the termination of the Lake Traverse Reservation as decreed by this Court in *De Coteau, supra*, fully support the conclusion that the Puyallup Reservation does not exist as an Indian reservation.[12]

3. THE DETERMINATION THAT THE PUYALLUP RESERVATION NO LONGER EXISTS HAS NOT BEEN REVERSED IN THE INSTANT PROCEEDINGS

At the conclusion of the original trial of this action, the trial court found:

> All the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the "Puyallup Tribe." The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres. (Find. Fact XII quoted in *Puyallup I*, 70 Wn. 2d at 253)

The Washington State Supreme Court affirmed that conclusion, which was directly challenged in the

[12]This Court currently has under consideration in No. 75-562, orally argued on January 12, 1977, review on certiorari of the reservation question in *Rosebud Sioux Tribe v. Kneip*, 521 F. 2d 87 (8th Cir. 1975). We respectfully submit that an affirmance of the Circuit Court opinion in *Rosebud, supra*, would compel the conclusion that the Puyallup Reservation no longer exists. However, if this Court reverses or modifies *Rosebud*, it would not necessarily result in a determination that the Puyallup Reservation continues to exist.

brief submitted by the Puyallup Tribe to this Court, page 43, wherein it was stated:

> The Indian petitioners submit that unless and until Congress enacts a termination act terminating federal supervision over the Puyallup Indian Reservation or constricting the boundaries of the original Puyallup Indian Reservation, the original boundaries mark the area within which the fishing rights reserved to them by the Treaty of Medicine Creek may be exercised without restriction by state laws or regulations.

In response to that contention, this Court noted in *Puyallup I*, 391 U.S. at 395, footnote 1,

> Whether in light of this history the reservation has been extinguished is a question we do not reach.

There has been no subsequent ruling in this Puyallup proceeding which has reversed that determination that the Puyallup Reservation no longer exists.[13] We therefore submit that conclusion is the law of the case and is binding in this proceeding unless this Court concludes that the Puyallup Reservation has not been terminated.

4. THE NINTH CIRCUIT RESERVATION DECISION

We have noted that the Ninth Circuit Court of Appeals in finding that the reservation had not been terminated remanded the matter for further proceedings. No further proceedings have been held and thus there has been no judicial determination as to the current boundaries of the reservation,

[13]See footnote No. 7, *supra*.

whether the reservation has been diminished or whether the Puyallup River, the course of which has been altered by action of the United States Corps of Engineers, has resulted in an ownership of the bed of the river by the United States government, or whether such ownership is in trust for the Puyallup Tribe.

The United States District Court observed in its memorandum opinion at page 3 (*U.S. v. Washington*, West. Dist. Wash. No. 39-71 C-3):

> *Assuming without deciding* that the members of the reorganized Tribe have some claim to the present bottom of the Puyallup River, it does not follow that the riverbed is the Puyallup Reservation. (Emphasis supplied)

The absence of a decision on that question is significant in light of the United States District Court in Montana in *U.S. v. Finch*, 395 F. Supp. 205 (1975) having concluded that the Big Horn River, which crosses the Crow Reservation, is not Indian trust land, distinguishing that situation from this Court's holding in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), involving the Arkansas River. What area is within the reservation and whether the riverbed would be considered to be Indian trust land are pertinent because the State of Washington pursuant to the authorization granted by Public Law 83-280 has assumed the responsibility of state jurisdiction over Indian reservations. The state jurisdiction under chapter 37.12 RCW applies to activities by enrolled members of the tribe on an established

reservation except those actions which occur on tribal and trust lands.

We recognize that Public Law 83-280 (25 U.S.C. 1321(b)) provides:

> Nothing in this section * * * shall deprive any Indian or Indian tribe, band or community of any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing, or the control, licensing, or regulation thereof.

When the State of Washington assumed jurisdiction, the same language was incorporated in Revised Code of Washington 37.12.060. However, this disclaimer of jurisdiction depends upon the existence of a priviledge or immunity granted by federal law related to hunting and fishing. As we have previously noted, the state court has concluded, pursuant to the remand of this Court, that hatchery fish are not subject to the provisions of the Treaty of Medicine Creek. Further, also pursuant to *Puyallup II* requiring an allocation of the harvestable fish, it has been determined that 55% of the native fish are not subject to harvest by the treaty Indians.

Thus these fish are not included within "any right, privilege, or immunity afforded under federal treaty, agreement, or statute * * *" hence the limitation on the exercise of state jurisdiction imposed by Public Law 83-280 is not applicable. Thus, the application of the state's jurisdictional act (chapter 37.12 RCW) means that the state has jurisdiction even within the reservation over fishing activities by Puyallup Indians when those activities exceed the treaty entitlement; i.e., 45% of the natural harvestable run. The only limitation is that the 1963 act (chapter 37.12 RCW) does not apply to tribal members within the reservation whose acts occur on tribal or trust lands. Thus, to the extent that Indian fishing activities do not occur on trust or tribal lands, even if one assumes the existence of the reservation, the state has jurisdiction to enforce the decree entered in this proceeding allocating the natural harvestable steelhead run in the Puyallup River and excluding from any special treaty fishery the hatchery steelhead run in the river.

D. The State Court Properly Exercised Jurisdiction Over the Subject Matter and the Parties

This action was initially commenced in 1963 to determine the nature and extent, if any, of treaty fishing rights of Puyallup Indians. In the course of the fourteen years of this litigation, including three trials, three State Supreme Court decisions, and two decisions by this Court, there have been consistent objections to the exercise of jurisdiction by the Washington State Courts. Those contentions were expressly considered by this Court in *Puyallup I*, 391 U.S. 392, at 396 footnote 11 wherein the contentions were rejected.

In *Puyallup II*, 414 U.S. 44, no explicit statement was made by this Court on the question of jurisdiction. However, the fact that this Court ex-

plicitly remanded the proceedings for determination of an allocation that accommodates the rights of the Indians under the treaty and the rights of other people was an express confirmation of continuing jurisdiction by state courts in this matter. If the petitioners' contention was valid, it would mean that this Court's direction to allocate the fish harvest would for all practical purposes have been impossible to establish, implement, and enforce. Surely this Court did not intend to direct the Washington State Courts to perform a useless act.

The right of the State to regulate its fishery resource has long been established by this Court. *McCready v. Virginia*, 94 U.S. 390 (1876); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Ward v. Racehorse*, 163 U.S. 504 (1896); *U.S. v. Winans*, 198 U.S. 371 (1905); *Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942); *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Puyallup I*, 391 U.S. 392 and *Puyallup II*, 414 U.S. 44. The State's concern with the regulation of its natural resource is clearly within its jurisdiction. The State in this proceeding has sought and continues to seek a determination as to the extent to which the State can regulate its fishing resource for the purposes of conservation. To determine the extent of that power with reference to Indian treaty rights, it is necessary to ascertain the individual rights which Indians possess so that

injunctive or other appropriate individualized relief can be sought against those Indians who violate the valid exercise of the State's regulatory power. This Court has consistently rejected the petitioners' claim of lack of jurisdiction and should continue to do so and thereby permit a final resolution on the merits of this fourteen years of litigation.

E. Reconsideration of Puyallup II, 414 U.S. 44

1. Request to Reconsider *Puyallup II*

This Court in *Puyallup II*, 414 U.S. 44, for the first time expressly recognized that net fishing by Indians for commercial purposes is covered by the Treaty of Medicine Creek.[14] In the same decision this Court for the first time required that there be an allocation between the treaty and non-treaty fishermen of the harvestable portion of the fish. The Washington Supreme Court in *Puyallup III*, 86 Wn. 2d 664, at 671, concluded that when it had considered this matter in *Puyallup II*, 80 Wn. 2d 561, it had erred in concluding that an Indian net fishery was a matter of right under the treaty and that error may have misled this Court in its resolution of *Puyallup II*, 414 U.S. 44. The State Supreme Court recognized that it is bound by this Court's decision in *Puyallup II*, 414 U.S. 44, but indicated that its independent conclusion would be that no allocation of the harvestable steelhead run is required and there is no special commer-

[14]We recognize that the Court made reference to *Puyallup I*, 391 U.S. 392 at 398-399 in support of that statement, but that decision does not explicitly state that commercial fishing is covered by the treaty.

cial entitlement. The State Court stated, *supra*, at 688:

> The first phase in our opinion is held in abeyance pending a final disposition of the treaty interpretation issue by the United States Supreme Court, at which time a reversal of the trial court decision, consistent with the first phase of this opinion, may be necessary.

The need for a reexamination of *Puyallup II* arises from the judicial construction of Indian treaties in western Washington, virtually the same as the Treaty of Medicine Creek, *supra*, which have followed this Court's *Puyallup II*, 414 U.S. 44, announcement of an allocation requirement and the inclusion of commercial fishing within the purview of the treaties. We believe that such interpretations have exceeded that which was contemplated by this Court in *Puyallup II*, *supra*, to such an extent that this Court should reconsider its *Puyallup II* decision.

A senior Federal District Court Judge in Western Washington has determined as a matter of law that the treaty phrase fishing "in common with all citizens of the Territory" requires as a matter of law a 50% allocation of the harvestable fish to treaty fishermen. *U.S. v. Washington*, 384 F. Supp. 312 (W.D., Washington) (1974) affirmed 520 F. 2d 676 (Ninth Cir., 1975), *cert. denied*, 423 U.S. 1086 (1976). The manner by which that Court has computed a 50% allocation is as follows:

1. Exclude from the total of harvestable fish all

fish which treaty fishermen either catch or desire to catch within the boundaries of Indian reservations.

2. Exclude from the total harvestable fish all fish that the treaty fishermen harvest for personal consumption or ceremonial purposes.

3. The remainder of the harvestable fish, after having subtracted No. 1 and No. 2 above, are divided into two parts with 50% reserved for the treaty fishermen. Further, the total harvestable fish includes those fish which are harvested in the ocean which is more than 180 miles from fishing grounds of the Puyallup Indians in and near the Puyallup River.

4. Then add to the treaty fishermen's 50% additional fish to reflect the harvest by Washington citizens beyond the territorial limits of the State of Washington.

5. Any fish which are caught by treaty fishermen at areas other than their usual and accustomed fishing grounds are counted not as part of the treaty 50% but rather are chargeable to the non-treaty allocation.

Although the district court relied primarily on a dictionary definition and ruled as a matter of law, the Court of Appeals affirmed that decision on the basis that the trial court had not abused its discretion in creating the 50% share.

In the area impacted by that decision, there are 283,650 salmon and sports fishermen, 145,000 licensed steelhead sports fishermen, 6,600 non-Indian commercial fishermen and 794 Indian commercial

fishermen. The Indian population accounts for only 0.28% people living in the area and most of that Indian population has been completely acculturated. Only 0.07% of the population are Indians still living within the boundaries of reservations.

In the instant proceedings, the state court has determined that 45% of the harvestable natural steelhead within the Puyallup River are subject to harvest by individual Indians. The remaining 55% are harvestable by sports fishermen since a commercial fishery for non-Indians is prohibited. In making that allocation the Court considered a number of factors including the 20 tribal fishermen who essentially support their families with the proceeds of the fishery, with an additional 10 providing a majority or partial support by fishing activities.[15] The harvest of salmon exceeds steelhead by a ratio of approximately 10 to 1 by the tribal members. The other fishing group; *i.e.*, the sports fishermen on the Puyallup consist of 3,243 fishermen who spent 92,514 hours on the river to catch 4,015 fish. This reflects some 23 fishing hours per steelhead being caught by sports fishermen on the Puyallup River. The basic inefficiency of harvesting fish by a hook-and-line fishery is such that relatively few regulations must be imposed. For example, the state limits the maximum catch to two steelhead per day with a maximum of 30 per year per fisherman. However, when a commercial fishery is introduced, a

[15]There are an additional 20 members of the tribe who fish occasionally, but normally that fishing does not include steelhead. (SF 759-60)

substantially more sophisticated on-going regulatory pattern is necessary to protect the fish resource. The existence of Indian net fisheries for steelhead has substantially increased the costs incurred by the State of Washington in managing the resource.

We submit that the consequences of this Court's *Puyallup II* decision requiring an allocation and recognizing a commercial fishery has had such an impact as we have indicated to warrant this Court reexamining that decision.

2. "In Common"—Treaty of Medicine Creek

The 1854 Treaty of Medicine Creek (10 Stat. 1132) has only one reference to the taking of fish which is found in Article III which we here requote for ease of reference:

> Article III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory*, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter. (Emphasis supplied)

The crucial language is the phrase "secured to said Indians, in common with all citizens * * *" The *Indians'* right is in common with *all citizens*. This is not a tribal right in common with the right of the government of the territory. When the right to

fish "in common" is considered with the proviso that Indians "shall not take shellfish from any bed staked or cultivated by citizens," the intent to make the usual and accustomed grounds and stations public places to which the Indians would have access along with non-Indian becomes clear. In considering this treaty language, reference should be made to the treaty with the Yakimas (12 Stat. 951) which is similar to the Medicine Creek Treaty including the right to fish off reservation "in common with all citizens of the Territory."[16] The reason for referring to the Yakima Treaty is that it reserves "the right in common with citizens of the United States to travel upon all public highways." The contemporaneous use of the words "in common" shows exactly what was intended—the Indians retained the opportunity to fish and so did the citizens of the territory. It is difficult to conceive that the term "in common" with reference to travelling on the public highways means the Yakima Indians are entitled to a specific part of the use of the highways; *i.e.*, one-half or any other established allocation of use. When the same phrase "in common" is used in the next sentence of the Yakima Treaty, with reference to fishing, we submit that the phrase means the same in both contexts, that is, it reserves the opportunity to use the public facilities or resources on the same basis as other citizens of the territory.

[16]Unlike the Medicine Creek Treaty, *supra*, that Yakima Treaty reserves the exclusive right to fish within the reservation, a similar explicit exclusive provision is included in the treaty with the Walla Walla of 1855 (12 Stat. 945).

This Court has considered the Yakima Treaty and the "in common" fishing provision in *U.S. v. Winans*, 198 U.S. 371 (1905), *supra* at 381. This Court noted that the taking of fish

> was a right outside of those boundaries reserved 'in common with the citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, the Indians were secure in its enjoyment by a special provision of means for its exercise.

This Court further found that the existence of that right did not restrain the State unreasonably, if at all, in the regulation of the right. However, it does fix in the land such easements as enables the right to be exercised. Thus this Court has construed the in common language to protect the Indian's right of access to the fishing areas. A similar conclusion was reached by this Court in *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919), *supra* at 196, where the Court observed:

> * * * they have shared such places with the Indians of other tribes from the south side of the river and with white men. This shows clearly that their understanding of the treaty was that they had the right to resort to those fishing grounds and to make use of them in common with the other citizens of the United States. * * *

This reading of the phrase "in common with" comports with the situation of the Indian tribes at the time of treaties. No formal political structures had been created by the Indians living in the Puget Sound area at the time of initial contact with the

United States Government. The United States organized the tribes and bands into formal political entities for the purposes of negotiating the treaties. But such political super-structures had no relevance to the Indians fishing activities. In an extensive report on Indian tribes of the Territory of Washington dated March 4, 1854, by George Gibbs (submitted to the Department of the Interior under the title "Tribes of Western Washington and Northwest Oregon", Part II, page 186, Dr. Gibbs observed:

> as regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking, in fact, such claim would be inconvenient to all parties, as the Indians move about on the sound particular, from one to another locality, according to the season.

Mr. James Doty in the minutes reflecting the treaty negotiations stated with reference to Article III, which is the Indian fishing provision,

> It was also thought necessary to allow them [the Indians] to fish at all accustomed places, since this would not in any way interfere with the rights of citizens and was necessary for the Indians to obtain a subsistence."
> Indians to obtain a subsistence. [cited by the trial court in Puyallup III, Appendix C-23].

This makes it clear that the Indians did not have a concept of a property interest in the resource, but rather the interest was in using various locations to harvest fish. It further indicates that the Indians were conversant with the concept of sharing locations since they shared their fishing opportunities with

other Indians and settlers. It is consistent with the concern of retaining access to locations to characterize the "in common" as an easement or access to the fishing areas which was the conclusion expressed by this Court in *U.S. v. Winans, supra.*

The United States Government and Lummi Indians in 1897 unsuccessfully attempted to enjoin the Alaska Packers Association from operating fish traps licensed by the State of Washington at Point Roberts, Washington. *U.S. v. Alaska Packers Association*, 79 Fed. 152 (Cir. Ct. Washington 1897). The Lummi Indians' Treaty of Point Elliot (12 Stat. 928) contains a treaty provision the same as that in the Medicine Creek Treaty re: fishing in common. The court observed, *supra*, at 155:

> * * * the words of this article indicate a purpose to secure to the Indians equality of rights, coequal with the rights of citizens, and not exclusive rights at any particular places.

The Court while recognizing that the fishing activities by the Alaska Packers Association would have an impact on the fish available to the Lummi Indians, nevertheless, refused to enjoin the operations of the fish traps. But the court did observe, *supra*, at 155-56 that to wholly deprive Indians of a chance to catch fish "* * * would certainly be an enfringement of the rights guaranteed to the Indians by the treaty."

3. "IN COMMON"—DICTIONARY DEFINITIONS

As previously indicated, the federal district court has concluded that "in common" means a division

into equal parts. We recognize that this Court in *Puyallup II*, 414 U.S. 44 provided that the allocation which must be devised is dependent upon a multiplicity of factors, *supra* at 48-49. However, since we are requesting a reconsideration of the allocation requirement, we should briefly discuss the dictionary definition of "common", which is the primary basis for the federal district court requirement of "equal sharing."[17]

The general definition of "in common" has not substantially changed since the Treaty of Medicine Creek in 1854. Compare an American Dictionary of the English language 231 (N. Webster 1862) with Websters' Third International Dictionary (1961). The 1862 Webster Dictionary defined common as follows:

> 1. *Belonging equally to more than one, or to many indefinitely;* as, life and sense are common to man and beast; the common privileges of citizens; the common wants of men.
>
> 2. *Belonging to the public;* having no separate owner. The right to a highway is common.
>
> 3. General; *serving for the use of all;* as the common prayer.
>
> 4. Universal; *belonging to all;* as, the earth is said to be the common mother of mankind.
>
> 5. *Public;* general; frequent; as, common report.
>
> * * * *A tract of ground, the use of which is not appropriated to an individual, but belongs to the public*, or to a number. Thus we

[17]We have previously noted the inequality of the "equal sharing", at pages ....-.....

> apply the word to an open ground or space in a highway, reserved for public use.
>
> 2. In law, an *open ground*, or that soil *the use of which belongs equally to the inhabitants* of a town or of a lordship, or to a certain number of proprietors; or the profit which a man has in the land of another; *or a right which a person has to pasture his cattle on land of another, or* to dig turf, or *catch fish*, or cut wood, or the like; called common of pasture, of turbary, of piscary, and of estovers. [Emphasis supplied]

All of these definitions with the exception of the first portion of number 1 denote a common public interest by many persons in the same thing, for example, a public park is frequently referred to as being a common area. The definitions do not lend themselves to the conclusion that a percentage of ownership interest is created in the natural resource. The trial court observed after making reference to *A New Abridgment of Law*, by Matthew Bacon (1793 pages 385 and 394) and an *American Dictionary of the English Language*, by Noah Webster 1828:

> that definition has as its clear thrust and impact that a right in common belongs to no one man but belongs equally to more than one, or to many indefinitely, as: life and sense are not common to man or beast, or: the common privileges of citizens, the common wants of man. That is, a right in common belongs to the public; it has no separate owner. (App. C-23)

This concept of having a common interest in the fish resource is consistent with the recognition by this Court that fish and game are a common resource for

all the citizens of the state. See, *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), wherein the court stated:

> Whilst the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions have led to the fact that power to control lodged in the state resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of government, or for the benefit of private individuals as distinguished from the common good * * * *the ownership is that of the people in their united sovereignty.* (Emphasis supplied)

Also see, *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). All citizens share the right to exploit the common fisheries, subject only to reasonable conservation regulations.

4. "IN COMMON"—EQUAL PROTECTION

These treaties must be examined in light of the circumstances existing in the United States when the treaties were negotiated. We are referring to the fact that prior to the passage of the 14th Amendment to the United States Constitution (1865) there were substantial numbers of people residing within the United States who were not entitled to the constitutional protections that are now taken for granted.[18] Prior to the 14th Amendment, Indians without a treaty right could have been discriminated against by various forms of exclusionary legislation. In that

[18]See, *Dred Scott v. Sanford*, 9 Howard 393 (1857), holding that there were no constitutional rights available for members of the Black race.

context the term "in common with the citizens" provided for Indian fishing activities the equivalent of a 14th Amendment right to be free from discrimination. The fact that Indians subsequently became entitled to the 14th Amendment protections against discrimination does not detract from the fact that at the time of the treaty such equality was of great significance. At the time of the treaty the Indians were not citizens and some of the normal methods of obtaining citizenship were not available to them. See, *Cohen's Handbook of Federal Indian Law*, 154 (1971). The interpretation of the treaty as being an assurance of equal treatment of Indians, plus the absolute right of access to fishing locations as announced by this Court, *U.S. v. Winan*, *supra*, does not mean that the Indians were merely given something that they would have had without a treaty.

Some of the rights created by the Indian treaties may be nugatory due to subsequent events; that is, the current enjoyment by Indians of all of the rights of citizenship of the United States. This does not mean, however, that a court should under the guise of interpretation expand and rewrite a treaty beyond its clear meaning at the time it was executed. See, *Choctaw Nation of Indians v. U.S.*, 318 U.S. 423 (1943).

It is noteworthy that the most recent decisions involving interpretations of these Western Washington treaties by the United States Supreme Court approach the matter of Indian fishing on the basis of

equal protection and freedom from discrimination. *Puyallup I*, 391, U.S. 392, 402 (1968):

> Any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

Puyallup II, 414 U.S. 44 (1973):

> There is discrimination here because all Indian net fishing is barred and only hook and line fishing, entirely preempted by non-Indians is allowed.

We therefore submit that a proper interpretation of the Treaty of Medicine Creek permits the State upon a non-discriminatory basis affecting all citizens both Indian and non-Indian to equally apply conservation regulations meeting appropriate standards. Such regulations cannot deny the Indians access to usual and accustomed fishing places nor can they restrain Indian fishing at those places except to the same extent that the regulations restrain the fishing rights of all state citizens.

5. No Special Commercial Entitlements Conferred by Treaty

Commercial fishing at the time of the treaties was rudimentary in nature and not statistically measurable. The Indians' prime concern was with fishing as a food source although there was limited trading of fish among themselves and with settlers. At the time of the treaty the supply of fish was essentially considered to be inexhaustible because of the limited population available to consume the fish. The situation changed in the last decade of the nineteenth

century following the invention and perfection of the canning process which led to the large scale development of commercial fisheries in the State of Washington. That development and the increased demands on the fishing resource have resulted therefore in restrictions and controls by the State in the interest of conservation and for the effective use of the resource.

The Indians are afforded an equal opportunity to catch fish in the all citizen commercial and sports fisheries. Treaty Indians are not charged license fees or landing taxes on fishing at usual and accustomed places. A significant number of them do participate in the all-citizen fisheries, both sport and commercial. In these activities both Indians and non-Indians fish with identical gear and in the same locations at the same time and for the same purposes. To the extent that Indians avail themselves of that opportunity they are afforded an opportunity to catch a share of fish commensurate with their efforts. The treaty protection of access to the resource and the ability to participate on an equal basis with all other fishermen negates any need to construe the treaty as conferring some superior right to participate nor the decreeing of a percentage of the resource or a special right to participate on a commercial basis that is precluded to other fishermen.

In 1946 Congress created the Indian Claims Commission to adjudicate the United States' liability to Indian tribes or groups. (25 USC § 70a, et seq.)

The Indian Claims Commission for a number of years has been hearing and deciding claims submitted by Indian groups. Through those proceedings the Commission has had an extensive exposure to Indian law, anthropology, history of treaties, and construction of treaties. A number of claims have been by tribal groups residing in Western Washington. In light of the substantial experience of the Commission with reference to Western Washington Indians and its expertise in the area of Indian law, substantial weight should be given the construction of Indian treaties by the Indian Claims Commission.

The Makah tribe, which under its treaty (12 Stat. 939) which also contains a provision relating to taking fish "in common", sought compensation from the Federal Government for restrictions on the tribal halibut fishing and sealing activities. The Indian Claims Commission in *Makah Indian Tribe v. U.S.*, 7 Indian Claims Commission 477, at 508 (1959) stated:

> (3) The reserving of Makah fishing rights at usual and accustomed places under the 1855 Treaty was founded upon the need of the petitioner tribe to maintain its then subsistence economy which was based primarily upon the immediate products of the sea, *and in no sense was this treaty provision a guarantee of future commercial fishing rights.* (Emphasis supplied)

This expression by the Indian Claims Commission regarding no guaranteed future commercial fishing rights is consistent with the concern at the time of the treaty with access to fishing areas and subsistence

fishing. As the Indian Claims Commission has indicated there was no intention to secure to the Indians pre-eminent role in the commercial fishery that developed some 40 years after the treaty. *Also see Whitefoot v. United States*, 293 F.2d 658, 660, U.S. Court of Claims (1961).

CONCLUSION

The respondent Washington State Department of Game respectfully submits that this Court should continue to reject the jurisdictional objections which have continued to be raised by the petitioners throughout this fourteen year proceeding. A decision by this Court on the merits of the controversy will have a salutary effect upon the controversy in this area since it will reflect judicial finality on the issues.

In resolving this matter we would urge that the Court:

(1) Uphold the determination that hatchery fish are not subject to the treaty entitlement. The petitioners' reference to an anticipated long, expensive, time consuming trial in another forum to commence in 1978 can essentially be avoided or substantially shortened by this Court resolving this issue at this time.

(2) Affirm the State Court's exercise of jurisdiction to enforce the allocation of the steelhead harvest in the Puyallup River.

(3) Reconsider *Puyallup II*, 414 U.S. 44 and declare that the "in common" provision of the treaty, while it protects access to the resource and precludes

the imposition of license fees is in all other respects the equivalent of the equal protection clause of the Fourteenth Amendment.

(4) Affirm the determination by the State Supreme Court in *Puyallup I*, 70 Wn. 2d 245 that the Puyallup Reservation has been terminated and no longer exists.

As we have indicated, even if the Court concludes that the Puyallup Reservation has not been terminated, that determination does not moot these proceedings because the record clearly indicates that Puyallup Indians do fish for steelhead outside the boundaries of the area claimed to be the Puyallup Reservation.

DATED this 24th day of February, 1977.

Respectfully submitted,

SLADE GORTON,
Attorney General,

EDWARD B. MACKIE,
Deputy Attorney General,

Attorneys for Respondent Department of Game and the State of Washington

I hereby certify that on this 25th day of February, 1977, three copies of the Brief of Respondent Department of Game of the State of Washington were mailed, postage paid, to:

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counsel for petitioners. I further certify that all parties required to be served have been served.

EDWARD B. MACKIE
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Temple of Justice
Olympia, Washington 98504

APPENDICES

10 Stat. 1132 (Treaty of Medicine Creek; Art. II and VI:

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the Shenah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said

Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

RCW 64.20.010 (§ 1, page 500, Laws of 1889-90):

SECTION I. That the said Indians who now hold, or who may hereafter hold, any of the lands of any reservation, in severalty, located in this state by virtue of treaties made between them and the United States, shall have power to lease, incumber, grant and alien the same in like manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions in reference thereto are hereby removed.

27 Stat. 612 at 633-634:

That the President of the United States is hereby authorized immediately after the passage of this act to appoint a commission of three persons, and not more than one of whom shall

be a resident of any one State, and it shall be the duty of said commission to select and appraise such portions of the allotted lands as are not required for homes for the Indian alotees; and also that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup Reservation, in the State of Washington, And if the Secretary of the Interior shall approve the sellections and appraisments made by said commission, the allotted lands so selected shall be sold for the benefit of the allottees, and the agency tract for the benefit of all the Indians, after due notice at public auction at not less than the appraised value for cash, or one-third cash, and the remainder on such time as the Secretary of the Interior may determine, to be secured by vendor's lien on the property sold.

It shall be the duty of said commission, or a majority of them, to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior, which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money; and the whole amount received for allotted lands shall be placed in the Treasury to the credit of the Indian entitled thereto and the same shall be paid to him in such sums and at such times as the Commissioner of Indian affairs, with the approval of the Secretary of the Interior, shall direct: *Provided*, That the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the City of Tacoma, and sold in seperate lots, in the same manner as the allotted lands, and the amount received therefor, less the amount necessary to pay the

expenses of said commission, including salaries shall be placed to the credit of the Puyallup band of Indians as a permanent school fund to be expended for their benefit: *And provided further*, That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof; and no part of the agency tract shall be sold until a majority of said Indians shall consent thereto in a written agreement, which shall also constitute said commissioners, or a majority of them, trustees to sell said land, as directed in this act, and make deeds to the purchaser for the same. The deeds executed by said commission shall not be valid until approved by the Secretary of the Interior, who is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisions. The proceeds arising from the sale of the allotted lands shall be placed in the Treasury to the credit of the respective allottees, and the net proceeds of the agency tract, after paying the expenses of said commission in the appraisment and sale of said lands, and reimbursing the United States for the amount advanced to said commission, shall be placed in the Treasury of the United States to the credit of all said Indians, and the said sums shall draw interest at the rate of four per centum per annum, and the income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior: *Provided;* That an amount not exceeding one tenth of the

principal sum may be expended for their benefit during any fiscal year, if deemed necessary by the Secretary of the Interior: *Provided further*, That the entire expense herein incurred shall be apportioned by the Secretary of the Interior pro rata between the several allottees and the owners of the tribal tract; and the Secretary of the Interior may in his discretion designate one member of said Commission to superintend the execution of any of the requirements of said Commission herein provided for.

And the sum of twenty thousand dollars or so much hereof as may be necessary, is hereby appropriated for the purpose of defraying the expenses of said commission, to be reimbursed to the United States out of the proceeds of the sale of that portion of the agency tract, to be immediately available.

SURVEYING AND ALLOTING INDIAN RESERVATIONS: Survey and subdivision of Indian reservations, and of lands to be allotted to Indians, and to make allotments in severalty, to be expended by the Commissioner of Indian Affairs under the direction of the Secretary of the Interior, twenty-five thousand dollars.


FIFE
INDUSTRIAL DISTRICT
TACOMA
DEVELOPMENT
PORT OF
MUNICIPAL TIDELANDS
AREA
TODD
CREEK
FIRWOOD
LAKEWOOD
WEBB CTR.
FEDERAL W
MIKHOR LAKE
WOODSTOCK
DASH PT.
BROWNS POINT